# Chuah Eng Khong v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S1-24-1016-1994
KC VOHRAH J
21 APRIL 1995

***Civil Procedure*** *— Merger, doctrine of — Whether applicable to proceedings to recover debt under loan agreement — Whether debt had merged with judgment of court — Whether borrower entitled to the return of issue document of title held as security for the loan*

Under a loan agreement the plaintiff borrowed money from the defendant bank in order to buy a house. The plaintiff also assigned his rights, title and interest on the property to the defendant. The plaintiff failed to repay the loan in full and the defendant proceeded against the plaintiff to recover the balance of the loan and interest and also delivery of vacant possession of the house. Default judgment was entered against the plaintiff by the sessions court. The plaintiff did not pay the judgment sum and the defendant served a bankruptcy notice against the plaintiff. The plaintiff's solicitors forwarded a cheque for the amount as full and final settlement of the amount shown in the notice and requested the solicitors for the defendant to give an undertaking to release the sum to the defendant only upon receipt from the defendant of the issue document title on the property which was then to be forwarded to the plaintiff. The defendant refused to accept payment of the cheque, on the ground that the payment was conditional upon return of the issue document of title; moreover, that they were entitled to interest at 12% under the loan agreement instead of 8% as awarded by the sessions court. The plaintiff applied for an order that the amount shown in the bankruptcy notice was the sum for full and final satisfaction of the default judgment. The issue was whether the debt of the plaintiff had merged with the judgment of the sessions court and therefore the plaintiff had a right to demand the return of his issue of document of title.

**Held**, dismissing the application:

(1) At the time the loan agreement cum assignment was entered into between the parties there was no issue document of the title on the property as yet and thus the defendant was assigned the plaintiff's rights over the property and not given a statutory charge under the National Land Code 1965.

(2) Although the plaintiff was obliged under the agreement to execute a charge on the land over to the defendant when the issue document of title was issued, the plaintiff did not do so and in fact he sold the property to a third party who in turn transferred rights over the property to another person. Both

these persons had lodged caveats on the land and the defendant had filed an action to remove these caveats.

(3) Clause 14 of the agreement was an independent covenant, which was not merged in or extinguished by the judgment obtained upon the principal covenant. The moneys secured by the land together with interest thereon — and interest here has to be understood as 12% pa under the terms of the agreement — had not been paid in full and the transfer and charge remained to be registered against the register of title. The defendant was entitled to retain the issue document of title until it had been paid the judgment sum and interest at 12% pa.

[**Bahasa Malaysia summary**

Di bawah satu perjanjian pinjaman plaintif telah meminjam wang dari bank defendan untuk membeli sebuah rumah. Plaintif juga telah menyerahhak hak, hakmilik dan kepentingannya di dalam hartanah itu kepada defendan. Plaintif gagal membayar pinjaman itu sepenuhnya dan defendan membawa tindakan terhadap plaintif untuk mendapat balik baki pinjaman itu bersama bunga serta penyerahan milikan kosong rumah itu. Penghakiman ingkar telah dimasukkan terhadap plaintif oleh mahkamah sesyen. Plaintif tidak membayar jumlah penghakiman dan defendan telah menyampaikan satu notis kebankrapan terhadap plaintif. Peguamcara plaintif menghantar satu cek utuk amaun itu sebagai penyelesaian penuh dan akhir amaun yang ditunjukkan di dalam notis itu dan meminta peguamcara defendan memberi satu akujanji untuk melepaskan jumlah itu kepada defendan hanya selepas penerimaan dari defendan surat hakmilik keluaran hartanah itu yang selepasnya mesti dihantar kepada plaintif. Defendan enggan menerima bayaran cek itu, atas alasan bahawa bayaran itu adalah atas syarat pengembalian surat hakmilik keluaran; lagipun, mereka berhak kepada bunga pada kadar 12% di bawah perjanjian pinjaman itu dan bukan 8% seperti yang diawardkan oleh mahkamah sesyen. Plaintif memohon untuk satu perintah bahawa amaun yang ditunjukkan di dalam notis kebankrapan itu adalah untuk pembayaran penuh dan akhir penghakiman ingkar itu. Isu yang timbul adalah sama ada hutang plaintif telah bercantum dengan penghakiman mahkamah sesyen itu dan oleh itu plaintif mempunyai hak untuk menuntut pemulangan surat hakmilik keluarannya.

**Diputuskan,** menolak permohonan itu:

(1) Pada masa perjanjian pinjaman dan penyerahhakan itu diikat di antara pihak-pihak itu masih tidak terdapat surat hakmilik keluaran untuk hartanah itu dan oleh itu defendan diberi serahhakan hak plaintif ke atas hartanah itu dan tidak diberi cagaran statutori di bawah Kanun Tanah Negara 1965.

(2) Walaupun plaintif dikehendaki di bawah perjanjian itu melaksanakan satu cagaran ke atas tanah itu kepada defendan

apabila surat hakmilik keluaran dikeluarkan, plaintif tidak berbuat demikian dan pada hakikatnya beliau menjual hartanah itu kepada satu pihak ketiga yang kemudiannya memindahhak hak ke atas hartanah itu kepada orang lain. Kedua-dua orang ini telah memasukkan kaveat ke atas tanah itu dan defendan telah memfailkan satu tindakan untuk mengetepikan kaveat-kaveat itu.

(3) Fasal 14 perjanjian itu adalah satu waad yang bebas, yang tidak bercantum dengan atau dilupuskan oleh penghakiman yang diperolehi atas waad utama. Wang yang dijamin oleh tanah itu bersama dengan bunga ke atasnya — dan bunga di sini mesti difahamkan sebagai 12% di bawah terma-terma perjanjian itu — masih belum dibayar sepenuhnya dan pemindahan dan cagaran kekal didaftar pada daftar hakmilik. Defendan berhak terus memegang surat hakmilik keluaran sehingga ianya dibayar jumlah penghakiman dan bunga pada kadar 12%.]

**Notes**

For a case on the doctrine of merger, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2291.

**Cases referred to**

*Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312 (refd)
*Economic Life Assurance Society v Usborne* [1902] AC 147 (folld)
*Harrison-Broadley & Ors v Smith* [1964] 1 WLR 456; [1964] 1 All ER 867 (refd)
*Hulton v Hulton* [1916] 2 KB 642 (refd)
*London Borough of Ealing v El Isaac* [1980] 1 WLR 932; [1980] 2 All ER 348 (folld)

**Legislation referred to**

National Land Code 1965
Rules of the High Court 1980 O 15 r 16
Subordinate Courts Rules 1980 O 29 r 12

*Malek Amtiaz* (*Vazeer Akhbar Majid & Co*) for the plaintiff.
*LH Chin* (*Ho, Loke & Koh*) for the defendant.

**KC Vohrah J:** Malayan Banking Bhd ('Maybank') proceeded against Chuah Eng Khong to recover the balance of a loan amount and interest under an agreement amounting to RM80,644.84 as at 12 November 1987 and also delivery of vacant possession of a house. Chuah had entered into the loan agreement cum assignment on 26 March 1984 with Maybank where he borrowed some money from the bank to buy the house and as security assigned his rights, title and interest on the property to Maybank.

Judgment in default of appearance of Chuah was given on 3 October 1988 as prayed for but the sessions court, Kuala Lumpur only allowed interest at 8% pa from date of judgment to date of realization, obviously acting under the then prevailing provision of the Subordinate Court Rules 1980, O 29 r 12, which allowed a maximum of 8% pa.

Chuah did not pay the judgment sum and Maybank then on 11 November 1994 served a bankruptcy notice (issued on 15 August 1994) for RM132,177,76 against Chuah. The solicitors for Chuah in a letter dated 17 November 1994 forwarded a cheque for the amount as full and final settlement of the amount shown in the notice and requested the solicitors for Maybank to give an undertaking to release the sum to Maybank only upon receipt from Maybank of the issue document title on the property which was then to be forwarded to Chuah. Maybank refused to accept payment of the cheque and in a letter dated 1 December 1994 its solicitors returned the cheque and stated that Chuah owed RM241,447.31 on Chuah's housing loan account as at 2 December 1994.

The upshot is this application by Chuah, the plaintiff, for an order that the amount shown in the bankruptcy notice served on him for RM132,177.76 is the sum for full and final satisfaction of the judgment given on 3 October 1988. I take it that the application is for the court to make a declaratory judgment under O 15 r 16. If necessary it is within the power of the court, although a declaration be not asked for, to grant one: *Hulton v Hulton* [1916] 2 KB 642 approved by the Court of Appeal in *Harrison-Broadley & Ors v Smith* [1964] 1 WLR 456; [1964] 1 All ER 867 and applied in *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312. There is a prayer that the issue document title (which was issued after the parties had entered into the loan agreement) be returned to him when the sum of RM132,177.76 is paid to Maybank, the defendant. There is also the usual prayer for costs.

During the course of the proceedings I wondered whether the matter should not have gone by way of bankruptcy proceedings since a bankruptcy notice appears to form the basis of the plaintiff's complaint. I invited further arguments on the matter and came to the conclusion that the issue was not the bankruptcy notice. The issue, and that is fundamental, is whether the debt of the plaintiff had merged with the judgment of the sessions court and therefore the plaintiff has a right to demand the return of the plaintiff's issue of document of title.

Coming back, thus, to these proceedings, counsel for Maybank says that the reason Maybank had rejected the cheque for RM132,177.76 sent in by the solicitors for Chuah was that the payment was made conditional upon return of the issue document of title by Maybank to Chuah. On Maybank's assertion that Chuah owed RM241,447.31 as at 2 December 1994 Maybank's contention is that it is entitled to 4% pa more over the 8% pa awarded by the sessions court on the judgment sum from the date of judgment to the date of realisation under the terms of the loan agreement and it is entitled to recover the judgment sum at 12% pa interest until date of realisation of the judgment.

At the time the loan agreement cum assignment was entered into between the parties there was no issue document of the title on the property as yet and thus Maybank was assigned Chuah's rights over the property and not given a statutory charge under the National Land Code 1965. Although Chuah was obliged under the agreement to execute a charge on the land over to Maybank when the issue document of title was issued, Chuah did not do so and in fact he sold the property to one Tan Ah Tong who in turn transferred rights over the property to one Chuah Choh Kiang. Both these persons have lodged caveats on the land and Maybank has filed an action to remove these caveats.

On the matter of interest Chuah had agreed under cl 1(i) of the agreement to 'repay to lender on demand the loan together with interest thereon at the rate of twelve per cent (12%) pa (hereinafter referred to as the 'prescribed rate' ...) and until demand ... to repay to the lender the loan together with interest thereon at the prescribed rate by one hundred and twenty instalments ... until the full amount of the loan and interest thereon together with all other moneys owing and payable shall have been fully paid and satisfied.'

Clause 14 of the agreement provides:

> This agreement shall remain in force until and unless the transfer and charge ... is duly registered against the register title to the said lot the whole of the moneys secured by the said lot together with interest thereon and all the other moneys payable to the lender are paid in full whichever first happens.

Counsel for Maybank argues that since the property was assigned to Maybank as security and in view of cll 1(i) and 14, Maybank is entitled to retain the issue document of title as security until full payment is made based on 12% pa as there is an independent covenant in the agreement to pay interest, meaning that the interest will accrue until the full amount is settled at the rate prescribed in the agreement, and he relies on *Economic Life Assurance Society v Usborne* [1902] AC 147. In that case there was a mortgage with a covenant to pay interest half-yearly on so much of the principal as shall remain unpaid. The mortgagors defaulted and the mortgagees recovered judgment against them for principal and interest. It was held at p 147:

> that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent interest, yet upon the true construction of this mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent.

Lord Davey (see p 152), referring to preceding authorities, said that the question to be considered is whether the covenant for the payment of the interest was an independent covenant or a covenant which was merely ancillary to the payment of principal money, and the conclusion is that it is:

> an independent covenant which is not merged in or extinguished by the judgment obtained upon the principal covenant.

A The above passages were quoted by Templeman LJ in *London Borough of Ealing v El Isaac* [1980] 1 WLR 932; [1980] 2 All ER 348 and his Lordship concluded:

> It appears, therefore, that merger has a very restricted operation. It does not, as appears from the *Usborne* case which I have just cited, apply to a
B security. It does not apply to what is said to be an independent covenant and in most mortgages and deeds of borrowing these days care is taken to make the covenant an independent covenant. So that, in practice, the number of times on which interest ceases to run from a date of judgment is very small. But on principle and on the authorities, it seems to me, the merger doctrine only applies to contracts and covenants.

C Going back to cl 14 of the agreement, it is clear it is an independent covenant. Merger does not apply. The moneys secured by the land together with interest thereon — and interest here has to be understood as 12% pa under the terms of the agreement — have not been paid in full and the transfer and charge remain to be registered against the
D register of title and it seems to me quite clear Maybank is entitled to retain the issue document of title until the bank has been paid the judgment sum and interest at 12% pa.

The application is therefore dismissed with costs.

*Application dismissed.*

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Reported by Rebecca MK Lee

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